In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-157

ASTOL CALERO-TOLEDO, Superintendent of Police, EDGAR R. BALZAC, Administrator of the General Services Administration of the Commonwealth of Puerto Rico,
APPELLANTS,

v.

PEARSON YACHT LEASING CO., a Division of Grumman Allied Industries, Inc.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

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MOTION TO AFFIRM

Appellee, pursuant to Rule 16(1)(c) and (d) of the Rules of the Supreme Court of the United States, moves that the final judgment and order of the District Court

be affirmed on the ground that the decision of the District Court is so obviously correct under the principles established by this Court in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *United States* v. *United States Coin and Currency*, 401 U.S. 715, 721, 722 (1971), as to warrant no further review by this Court. Furthermore, the appeal should be dismissed insofar as it purports to raise issues of fact not raised in the Court below.

Opinion Below

The memorandum opinion and order of the District Court is not reported as yet, but is set forth in Appendix "A" of appellants Jurisdictional Statement. The judgment of the Court, filed and entered on June 15, 1973, is included herewith (Appendix 1).

Jurisdiction

The jurisdiction of this Court to review the decision of the District Court is not contested.

Questions Presented

1. Whether appellee had a property interest in the yacht as would support a claim of deprivation of property without due process of law and taking without just compensation, is not in issue because appellants stipulated that appellee was the "lawful owner" of the seized property (Appellants' Jurisdictional Statement, Appendix C, Paragraph 9). Consequently, they cannot raise this issue for the first time on appeal.

2. Whether seizure and forfeiture of a person's property without a hearing, due to lack of notice, is a denial of due process; and,

3. Whether seizure and forfeiture of an innocent person's property is confiscatory and therefore, a taking of property without just compensation.

Supplemental Statement

Appellants' Statement of the Case, as it appears in pages 3 to 6 of their Jurisdictional Statement, contains certain assertions which require clarification. This case was tried on stipulated facts, printed in Appellants' Appendix C, and the sole issue before the District Court was whether the contested statutes [The Controlled Substances Act of Puerto Rico, June 23, 1971 (24 L.P.R.A. §1201-1207), and the Uniform Vehicle, Mount, Vessel and Plane Seizure Act of June 4, 1960 (34 L.P.R.A. §§ 1721-1722)], in their application to plaintiff, violate the due process and the "Taking Clauses" of the Fifth and Fourteenth Amendments of the United States Constitution.

The stipulated facts submitted by the parties were adopted by the Court in its findings (printed in Appellants' Appendix A, at pp. 22-23).

The record, both in the District Court and before this Court, fails to reveal any effort on the part of appellants to question appellee's proprietary interest in the seized property. On the contrary, in their answer to the complaint and in the stipulation of facts, Paragraph 9, they admitted that at the time of the seizure "the lawful owner of the seized property was Pearson Yacht Leasing Company".[1] Notwithstanding, appellants now purport to create an issue as to appellee's property right in the Court below by stating as a conclusion that "Pearson *sold* the yacht to its 'lessee' ".[2]

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[1] Appellants' Jurisdictional Statement, Appendix C, page 39.
[2] Id., at page 4.

There is another statement with which issue is taken.[3] The three-judge court never "ordered Puerto Rico to pay Pearson the appraised value of the yacht", as stated by appellants. It merely indicated that it would not provide a specific remedy "inasmuch as Section 1722(d) of Title 34, provides adequate relief".[4]

In commenting on the holding of the Court, appellants fail to include lack of notice as an element thereof.[5] Instead, they resort to their own interpretation to conclude at page 6 of the Statement, that "(The court did *not* hold that Puerto Rico had failed to make reasonable efforts to notify interested parties before the forfeiture, specifically indicating that had this issue been reached it would have ruled with appellants, app. A, infra, p. 26)". The decision of the District Court is quite clear in regard to the issue of notices:

> "For the foregoing reasons, it is hereby declared that Section 2512 (a) (4) of Title 24, and Section 1722(a) of Title 34 of the Laws of Puerto Rico are unconstitutional, and an injunction will issue permanently restraining defendants and their successors from enforcing the foregoing provisions insofar as they deny the owner or person in charge of property an opportunity for a hearing, *due to the lack of notice,* before the seizure or forfeiture of its property *and, insofar as a penalty is imposed upon innocent parties.*"[6] [emphasis supplied].

The Court's order declares the statutes unconstitutional as applied to appellee, Pearson, on the ground that hearing, *due to lack of notice,* was not given before the seizure and forfeiture *and* a penalty is imposed upon innocent

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[3] Id., at page 5.
[4] Id., Appendix A, at page 30.
[5] Id., at page 6.
[6] Appellants' Jurisdictional Statement, Appendix A, p. 29.

parties. The injunction eventually filed and entered by the Court on June 15, 1973,[7] is limited to the facts of this case, that is, an innocent owner deprived of its property without compensation and without a hearing due to lack of notice. Based upon the factual setting before it, the Court relied on *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *United States* v. *United States Coin and Currency*, 401 U.S. 715, 721-722.

Finally, it must be pointed out that appellants at no time presented evidence or even raised an issue as to appellee's right to compensation. On appeal, they now pretend to raise the issue for the first time.[8] On the contrary, by the Stipulation of Facts they recognized appellee as the lawful owner of the property.

Argument

Appellants contend that the questions presented are substantial. Appellee agrees and points out that were it not for that fact, the case would not have been adjudicated by a three-judge court. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *McNeese* v. *Board of Education for Community School District No. 187*, 373 U.S. 668 (1963); and *Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972). Appellee, throughout the proceedings, has claimed that seizure and forfeiture of an innocent person's property without compensation and without a hearing, due to lack of notice, amounts to a substantial violation of constitutional rights. The District Court agreed and, consequently, enjoined defendants from continuing to deprive appellee of its rights.[9]

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[7] Judgment, Record on Appeal, Volume I, p. 23, printed herein as Appendix I.

[8] Appellants' Jurisdictional Statement, supra, Paragraph 4, at p. 17.

[9] Appellee's Appendix I, at pp. 12-13.

That the decision of the District Court adjudicated substantial constitutional rights does not, of itself, compel this Court to grant further review. Where the unconstitutionality of the challenged state statute is so patent and the decision of the three-judge court so obviously correct, the decision should be affirmed. The principles underlying the decisions in *United States* v. *United States Coin and Currency, supra,* and *Fuentes* v. *Shevin, supra,* are clearly dispositive of the present appeal and lead to the conclusion that the seizure and forfeiture of appellee's vessel without a hearing, due to lack of notice, and without compensation, is a violation of the constitutional amendments invoked. This is so despite appellants' belated attempts to save a statute which on its face is clearly unconstitutional.

Point I — Application of Due Process Requirement to Case

The argument that the statute involved meets due process requirements is wholly unfounded. For instance, Subsection (2) of Section 1722 of Title 34, Paragraph (a), starts out stating: "The proceedings shall be begun by the seizure of the property . . .". Notice and the opportunity for a hearing (the meaningfulness of this hearing is discussed in Point II, infra), is given only after the person has been summarily deprived of the property. Does such a procedure conform to the requirements of the due process clause? Appellee contends it does not.

The right to an opportunity for a meaningful hearing before being deprived of any significant property interest has long been recognized by this Court and recently reaffirmed in the *Fuentes* case. The only exception to justify postponing the hearing until after the event, has been in the case of *extraordinary situations* where some valid

governmental interest is at stake. These extraordinary situations were outlined by this Court in *Fuentes, supra,* (407 U.S. at p. ; 92 S. Ct. at p. 2000). Forfeiture proceedings are not one of those situations. Therefore, the lack of notice and consequential lack of opportunity for a meaningful hearing, which the challenged statute fails to provide and which were not given in this case, must be examined in the light of these principles.

There is no constitutional distinction beetween *Fuentes* pre-hearing seizures and the pre-hearing seizure authorized by the Puerto Rican statute. It simply cannot be said, as appellants pretend, that due process requirements are of any less basic importance to the owner or person in possession of certain property when the seizure is effected at the instance of a government officer, as in this case, the Superintendent of Police acting pursuant to a forfeiture statute as when it is effected by some other officer acting pursuant to a replevin statute. The establishment of a distinction between a debtor in default and a person suspected of having committed a crime for purposes of summary deprivation of property rights in indefensible as a basis for selectively applying the fundamental principle of due process enunciated in *Fuentes.* The application of the principles underlying *Fuentes* cannot turn on such a subjective test, which would grant unfettered power to a government official not only to seize property, but to adjudicate guilt prior to hearing. (It must be pointed out that the property involved herein is not by its own nature *malum in se*, such as contraband, narcotics, weapons, or, which is seized as evidence to be used in a criminal prosecution. *United States* v. *Jeffers,* 342 U.S. 48, 54; *Trupiano* v. *United States,* 334 U.S. 699, 710.)

Further, any attempt to vest these officials with such broad powers as claimed by appellants, could very well lend itself to the type of abuses which the "founding

fathers'' sought to curtail. It is precisely the ''overbearing concern for efficiency and efficacy which may characterize praise-worthy government officials'', that in many instances encroaches upon the fragile values of a vulnerable citizenry. *Stanley* v. *Illinois,* 405 U.S. 645, 656.

The suggestion by appellants that seizure in forfeiture proceedings is like seizure of evidence for a criminal proceeding so as to remove it from the ambit of the due process principle underlying *Fuentes,* is wholly spurious. The owner or possessor of property of the nature involved in this case is not likely to destroy or hide the same if given any prior notice. Whether it be an automobile, an airplane, a vessel or even a mount, it is usually too valuable to destroy for the sake of merely depriving the government of the opportunity to forfeit the same. Further, even if appellant had so established, one fails to see how the destruction of the conveyance would interfere with or jeopardize criminal prosecutions. Likewise, it cannot be said that summary seizure in forfeiture proceedings serves any highly important governmental need in order to exempt it from the meaningful hearing and notice requirement of the due process clause. The District Court properly found forfeiture as not being one of those extraordinary situations justifying postponing a hearing, especially in view of appellants' failure to so claim or prove. (Appellants' Appendix A, at p. 28).

Appellee, like other litigants summarily dispossessed of their goods and chattels, is entitled to the same due process protection as any other citizen.

The considerations which appellants offer as countervailing justification for dispensing with prior notice and hearing, are no more adequate than those offered by the States of Florida and Pennsylvania in *Fuentes,* to override the interests of this appellee in being notified and given a meaningful hearing.

POINT II — APPLICATION OF "TAKING CLAUSE" TO CASE

The alleged errors in the application of the "taking clause" to the case at bar, were not committed. The position adopted by the Court in its opinion is, likewise, so obviously correct under the principles voiced by this Court in *Coin and Currency, supra,* as to warrant no further review.

Appellants do not seriously contest the conclusion reached by the Court on this issue, but instead suggest that the statute be construed as allowing innocence as a defense. The problem with this suggestion is that the Supreme Court of Puerto Rico had interpreted the statute as precluding such a defense. *Commonwealth* v. *Superior Court,* 94 P.R.R. 687 (1967). The fact that the Federal Court may not have desired, for reasons of its own, to be bluntly critical of the majority opinion of the court, should not be interpreted as an escape from the constitutional challenge presented. Obviously, the case reached litigation because of appellants' reluctance to return the property or pay its appraised value; thus, compelling adjudication of the constitutional claim. On appeal, error is alleged because the lower court declared the statute unconstitutional, "insofar as a penalty is imposed upon innocent parties", instead of interpreting the same as allowing such a defense. Were it not for *Commonwealth* v. *Superior Court, supra,* appellants' argument might carry some weight.

In any event, having declared the statute unconstitutional solely *"insofar as a penalty is imposed upon innocent parties"*, causes no more prejudice to the government than if the court had interpreted the statute as including innocence as a defense. In either case, appellants may still confiscate and impose a penalty upon those who are significantly involved in a criminal enterprise. Contrary to

what appellants would like this Court to believe, the statute was struck down when applied to situations where it is enforced to impose a penalty upon an innocent party. In this limited context, the decision of the court below is squarely within the expressions of this Court in *Coin and Currency*.

That the Puerto Rican statute was practically copied from federal forfeiture statute is not in this case a circumstance that would warrant further review by this Court. Unlike its federal counterpart, the Puerto Rican statute has no provision like 18 U.S.C. § 1618 for remission of the penalty in the case of innocent persons. It was precisely because such a remedy was available that this Court did not reach the issue in *Coin and Currency, supra*, at page 721.

The considerations advanced as justification for a statute having such broad interpretation is no more adequate than those advanced in *Coin and Currency* to override the interest of an innocent person from being penalized by forfeiture. If appellants' argument were to be carried to its logical conclusion, shipowners, car rental companies, banks and a host of other enterprises, would confront the dilemma of having to stop doing business or risk the loss of their property. Such alternatives are foreign to our constitutional system.

The considerations adduced in the third and fourth part of the Jurisdictional Statement concern issues of fact that were not properly brought before the District Court. Appellants' belated attempt to litigate these matters on appeal should not be entertained.

Conclusion

Appellee respectfully submits that this Court's decisions in *Fuentes* v. *Shevin*, and in *United States* v. *United States*

Coin and Currency, supra, are clearly dispositive of the question presented by this appeal, and that the final judgment and order of the District Court should be affirmed without further review by this Court.

GUSTAVO A. GELPI
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Of Counsel:
NACHMAN, FELDSTEIN & GELPI

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
Civil No. 1018-72

PEARSON YACHT LEASING COMPANY,
Division of Grumman Allied Industries, Inc.,
PLAINTIFF,

v.

ASTOL CALERO, as Superintendent of Police of the Commonwealth of Puerto Rico, and EDGAR R. BALZAC, as Administrator of the General Services Administration of the Commonwealth of Puerto Rico,
DEFENDANTS.

JUDGMENT

This cause came to be heard on plaintiff's motion seeking permanent injunction against defendants, and the Court having heard oral argument and considering the stipulation of facts filed by the parties, and it appearing to the Court that the defendants committed, are committing and intend to continue to commit acts in violation of plaintiff's constitutional rights; and it further appearing that unless restrained by order of this Court the plaintiff will continue to be deprived of its property without due process of law and without just compensation, now, after due deliberation having been had thereon and for the reasons set forth in the Memorandum Opinion and Order filed and entered March 29, 1973, it is

ORDERED, ADJUDGED and DECREED, that defendants Astol Calero and Edgar R. Balzac, their officers, agents, representatives, employees and all persons in active concert and participation with them be, and they hereby are, permanently enjoined and restrained from in any manner

depriving the plaintiff of its property without due process of law and without just compensation; and it is further

ORDERED, ADJUDGED and DECREED, that defendants Astol Calero and Edgar R. Balzac, their officers, agents, representatives, employees and all persons in active concert and participation with them be, and they hereby are permanently enjoined and restrained from enforcing the provisions of Section 2512(a)(4) of Title 24 and Section 1722(a) of Title 34 of the Laws of Puerto Rico Annotated, insofar as these deny the owner or person in charge of property an opportunity for a hearing due to the lack of notice before the seizure and forfeiture of its property, and insofar as a penalty is imposed upon an innocent party; and it is further

ORDERED, ADJUDGED and DECREED, that Section 2512(a)(4) of Title 24, and Section 1722(a) of Title 34 of the Laws of Puerto Rico Annotated be, and they hereby are declared unconstitutional.

The present judgment is to be effective twenty (20) days after the date of its issuance in view of the reasons set out in our order of this day.

San Juan, Puerto Rico, June 15, 1973.

(s) FRANK M. COFFIN
FRANK M. COFFIN, *Chief Judge*
U. S. Court of Appeals for the First Circuit, Presiding

(s) HIRAM R. CANCIO
HIRAM R. CANCIO, *Chief Judge*
U. S. District Court for the District of Puerto Rico

(s) JOSE V. TOLEDO
JOSE V. TOLEDO, *Judge*
U. S. District Court for the District of Puerto Rico